DOCUMENT RESUME

ED 230 702 CE 036 069

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TITLE The Reagan Administration's EEO Policy.
INSTITUTION Department of Justice, Washington, D.C.
PUB DATE 2 Jun 83
NOTE 16p.; Presented at a meeting of the Bureau of National Affairs (Washington, DC, June 2, 1983).
PUB TYPE Reports - Descriptive (141) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Administrative Policy; Affirmative Action; Civil Rights Legislation; Compliance (Legal); *Court Litigation; Employment Practices; *Equal Opportunities (Jobs); *Federal Courts; Federal Government; Federal Legislation; Females; *Law Enforcement; Minority Groups; Policy; Racial Discrimination; Reverse Discrimination; Sex Discrimination; Sex Fairness
IDENTIFIERS *Civil Rights Act 1964 Title VII; *Reagan Administration

ABSTRACT

The Reagan administration is committed to the principle of equal employment opportunity (EEO). No policy shift has occurred in the treatment of "class action" litigation, or in the "pattern or practice" suits in the Justice Department's Title VII enforcement activities. Significant money settlements have been obtained in "pattern and practice" cases on behalf of those victimized by discriminatory conduct. Statistical analyses continue to be used in determining liability, and from this it follows that the Reagan administration looks for discriminatory effects in the employment field no less than for discriminatory intent. The enforcement record over the past two-and-one-half years underscores the strength of the administration's commitment to equal employment opportunities. In every case the Justice Department insists that the prior discrimination be enjoined and that the employer engage in nondiscriminatory hiring and promotional practices in the future. Furthermore, employers who have discriminated in employment practices are required to make affirmative action recruitment efforts. Under this approach, no resort to hiring quotas or numerical goals exists, since preferential treatment due to race or sex cuts against the grain of equal opportunity. (YLB)

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Department of Justice

REMARKS OF

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BEFORE

THE BUREAU OF NATIONAL AFFAIRS, INC.

"THE REAGAN ADMINISTRATION'S EEO POLICY"

AT

SHERATON WASHINGTON HOTEL
JUNE 2, 1983
2:00 p.m.

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THE REAGAN ADMINISTRATION'S EEO POLICY

I am pleased to have been invited to speak to you this afternoon on "The Reagan Administration's EEO Policy." Because your principal area of interest focuses on enforcement activities in the employment arena, I will resist the natural temptation to begin with a catalogue of the Administration's major accomplishments on other civil rights' fronts. Let me simply make note of the fact that our enforcement record to date is an enviable one that demonstrates an exceedingly high -- indeed, in many respects unprecedented -- level of activity. We have, for example, attacked discrimination in schools, voting and parks in Chicago; employment discrimination in Milwaukee and Virginia; voting discrimination in Mobile and Dallas County, Alabama; housing discrimination in Cicero, Illinois, and California; police brutality in New Orleans; Klan violence in Greensboro, North Carolina; and sex discrimination in law firms, police departments, and in American subsidiaries of foreign businesses, to name just a few highlights.

To the extent that we have been portrayed as uncaring and insensitive, as lacking commitment, and as retreating on civil rights, our critics have rested their accusations on the broadest of generalities, ignoring the facts and steering clear of the actual record. Employment is but one case in point, as my remarks this afternoon will demonstrate; but no one should conclude from the limited focus of the discussion that follows that the rebuttal to similar charges in all other areas of civil rights enforcement is any less forceful.

With that brief introduction, let me turn to the matter at hand. It is by now no great revelation that a fixed and guiding principle of this Administration is that race is an impermissible basis on which to allocate resources or penalties. Our mission at the Justice Department -- indeed our statutory and constitutional duty -- is to pursue relentlessly the eradication of race and sex discrimination in all of its forms in this country -- the subtle as well as the not so subtle. The ideal of equal justice under law compels the elimination of race and gender as standards of evaluation. Each individual in society deserves to be judged on his or her talents alone, without regard to gender or skin color, and no person who is innocent of wrongdoing should be made to suffer the sting of rejection solely because of another's race or sex. These are the principles on which the Constitution and federal laws in this country are founded, and we are dutybound to see to it that they are upheld without compromise.

Attorney General Smith left no doubt about this Administration's commitment to the principle of equal opportunity as early as May, 1981, when he stated in his speech to the American Law Institute: "[I]n a just society, government must not require either racial balance or racial separation -- and government must not guarantee any individual a result based upon his or her race." Those words obviously have equal force with regard to matters of sex.

This has been the central theme of the Justice Department's Title VII enforcement activities. As you know, the Department's

principal responsibility in this area concerns public employment, that is, state and local government employers. When I first assumed my position as Assistant Attorney General, there were a sizeable number of public employment cases already pending at the Civil Rights Division, either in an investigatory stage or in actual litigation. The approach taken with regard to the question of liability in each of those matters has remained the same throughout my tenure -- proceeding on precisely the terms advanced by my predecessors.

Thus, contrary to the charge often voiced by our critics, no policy shift has occurred in our treatment of "class action" litigation -- more accurately described as "pattern or practice" suits. We have commenced and continued such actions in the same manner as before, and we have recovered large amounts of money on behalf of all identifiable victims of the unlawful discriminatory practices. The back pay award of $2,750,000 obtained last year by the Civil Rights Division against Fairfax County, Virginia, on behalf of 685 women and blacks who were victims of discrimination, was the largest Title VII recovery against a public employer -- both in terms of the number of dollars involved and the number of individual beneficiaries -- in the history of the Department. And, in a separate employment discrimination case involving the Nassau County police department in Long Island, New York, we secured a back pay award of $1,300,000. Nor do these two cases stand alone. There are other, similar examples I could point to of significant

relief we have obtained in "pattern and practice" cases on behalf of those victimized by discriminatory conduct.

Another popular misconception that should be laid to rest is that we have abandoned statistical analyses in determining liability. That, too, is simply not the case. The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1970), and its progeny set a clear course to be followed in establishing a Title VII violation. We take those decisions as we find them and apply the law in each case in accordance with Supreme Court precedent. Both disparate treatment and disparate impact analyses are used in our litigation efforts, and statistical evaluations are a regular part of our investigations and trial preparation.

From this it follows -- again contrary to some reports -- that we look for discriminatory effects in the employment field no less than for discriminatory intent. Where a disparate impact on minorities or women can be shown as a result of an employer's hiring and promotion practices, the burden in our cases -- as in those involving private employment -- shifts to the employer to demonstrate that the adverse effects are job related or based on validated selection criteria. The Department's litigation strategy in this regard has undergone no change.

Our enforcement record over the past two and one-half years amply underscores the strength of our commitment to equal employment opportunity. The Division is actively involved in over 100 employment discrimination lawsuits, including a number of outstanding

decrees that we are monitoring. We have filed 15 new cases since January 20, 1981, one of which is our case against the Town of Cicero, Illinois, where, for the first time ever, the Division combined in a single lawsuit both housing and employment discrimination claims. There are, moreover, currently 23 ongoing investigations of employment discrimination involving 36 state or local governments. And, we have participated in some 14 other employment cases in the Supreme Court.

Virtually all of this litigation activity fits the traditional mold. The discriminatory conduct we are challenging is aimed at blacks, women, Hispanics and other minority groups, and has the effect of excluding those individuals from the workforce solely on account of race or sex. There thus is no substance whatsoever to the politically motivated accusation that we have abandoned the fight to eradicate such exclusionary practices from public employment in this country. That fight goes on today, as it has in prior years, with equal intensity and commitment. To be sure we have announced in three cases that race-based exclusionary practices against whites find no safer harbor under the law. But disagreement with our stand in those three matters hardly justifies the wholesale condemnation that some have seen fit to level at the Administration's enforcement activity in employment matters. Whether measured against a comparable period in prior administrations, or simply assessed on its own terms, the record we have compiled is an impressive testament to the Administration's overarching commitment to equal employment opportunity.

The relief we seek in these cases also speaks eloquently to that commitment. As in the past, the Department insists in every case that the prior discrimination be enjoined and that the employer engage only in nondiscriminatory race- and sex-neutral hiring and promotion practices in the future. In addition, as in the past, we seek as an element of Title VII relief the affirmative remedies of backpay, retroactive seniority, reinstatement, and hiring and promotion priorities, for all individual victims of discrimination in order to restore them to their "rightful place" -- that is, to the position they would have attained but for the discrimination. Moreover, this "rightful place" relief is, in our view, available not only to those applicants turned away on account of race or sex, but also to those qualified individuals shown to have been discouraged from ever applying for employment because of their knowledge of the employer's unlawful discrimination.

Let me add just a word with regard to this point. There are those who insist that reliance on individual relief for identifiable victims is too harsh an approach, because few who have actually suffered can prove their claim of entitlement to "rightful place" relief. The available evidence, however, proves this thesis to be wrong -- most likely because it fails to appreciate the way in which the statute works. Once liability has been established, a presumption arises in favor of those claiming to be victims. For example, minorities who have been denied employment or promotion by use of a test that is not job-related need not prove affirmatively

in each instance that their exclusion was the result of illegal discrimination. Rather, the law presumes them to be entitled to "make whole" relief, and restoration to their rightful place in the workforce, in the absence of a showing by the employer that legitimate, nondiscriminatory considerations explain the treatment accorded them. This presumption reflects a legislative judgment that the more subtle forms of discrimination as well as the more obvious can and should be redressed. It is, however, presumptions -- not preferences -- that are recognized in the law.

There is one final element in our Title VII relief package. Employers who have offended the nondiscrimination command of the 1964 Civil Rights Act are, under our decrees, required to make special, affirmative efforts to recruit minority and female workers from those communities that had been ignored in the past, and to file periodic reports on the recruitment efforts. Such relief is, as it must be, tailored to fit the violation, since in virtually every instance of unlawful employment discrimination, the employer's search for new employees has been confined -- geographically and otherwise -- in a manner that reaches few minority and female applicants. Such comprehensive outreach programs are designed to break that stranglehold, and force employers to make known to the entire relevant labor market that employment opportunities are available to all qualified persons.

In a recent opinion approving a Justice Department consent decree providing for the above relief, a federal district court had this to say:

> The . . . Consent Decree retains the requirement that the [employer] seek out and recompense those who may have been the victims of past sex and race discrimination. It also requires, quite properly, that the [employer] intensify its recruitment of females and blacks in view of their historical exclusion from many areas of . . . work. But the decree makes clear, in obediance to statute and the Constitution, that employment decisions must not be based on race and sex.
>
> Whoever gets ahead in the [employer's workforce] under this decree can rest assured that he or she, black or white, earned it on merit. 1/

How effective have these "affirmative action" recruitment requirements been? We now have a few preliminary results based on some of the decrees entered during the Administration's first year in office. In those decrees, the Department and the employer undertook to assess generally the likely applicant flow that might be expected in response to a vigorous recruitment effort. These projections -- expressed in terms of recruitment goals, or the likely percentage of qualified minority and female applicants who would be in the available pool of those eligible for hire on a nondiscriminatory basis -- have for the most part been fully realized, and in some instances exceeded, under our decrees. It is undeniable that "affirmative action" recruitment requirements -- when conscientiously implemented -- produce greater numbers

1/ United States v. Commonwealth of Virginia Department of Highways and Public Transportation, 554 F. Supp. 268 (E.D. Va. 1983).

of qualified minorities and women applying for employment. And, as would be expected, a nondiscriminatory hiring process brings more of those applicants into the workforce.

There is, under this approach, no resort to hiring quotas or numerical goals. With that so-called "affirmative action" feature removed, the employer no longer has a convenient ceiling to hide under. He now cannot hire a set number of black and female employees in order "to get the government off his back," and then ignore other blacks or women, who, by all objective criteria, fully deserve employment. Nor by the same logic can he pass over better qualified white male applicants in an effort to satisfy some predetermined hiring or promotion goal. The law in this regard is wholly neutral and assigns no man or woman an advantage by reason of sex or skin color.

The Attorney General has set forth the full legal argument in support of this reading of both the Constitution and Title VII in the Government's brief in the New Orleans Police case, now pending in the Fifth Circuit. The complaint in that action was filed in 1973 by thirteen named black police officers, and by applicants for appointment as police officers, in the New Orleans Police Department (NOPD). Plaintiffs alleged that the City of New Orleans and various other government defendants had engaged in racially discriminatory employment practices in violation of, inter alia, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. Before commencement of trial, the parties submitted

for the District Court's approval a consent decree governing "virtually every phase of an officer's employment by the NOPD." 543 F. Supp. at 668. The proposed consent decree included a provision requiring the promotion of one black officer for every white officer until blacks constituted 50% of the sworn officers in all ranks of the NOPD.

Objections to the decree, particularly the one-to-one promotion quota, were filed by classes of female officers, Hispanic officers, and white officers, which had been permitted to intervene for the limited purpose of challenging the decree. The district court approved the decree's extensive provisions pertaining to recruiting, hiring, training, and testing, but refused to approve the proposed one-to-one quota. A divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that the district court had abused its discretion in refusing to approve the proposed promotion quota.

In challenging that panel decision, the Government has argued that Section 706(g) of Title VII does not tolerate remedial action by courts that would grant to nonvictims of discrimination -- at the expense of wholly innocent employees or potential employees -- an employment preference based solely on the fact that they are members of a particular race. Preferential treatment based on race was the very practice that Congress sought to condemn by the statute, and quota relief as a possible judicial remedy was explicitly rejected by the chief sponsors of the 1964 legislation. Moreover, the

history of the 1972 amendments to the Act provides no support for overturning the original legislative intent.

Accordingly, our brief argues that the NOPD one-for-one promotion quota, fashioned to work to the advantage of one group -- not as victims of the original discriminatory practices but solely as members of a particular race -- while so obviously disadvantaging other groups of innocent employees on account of their sex or skin color, must fail under any construction of the statute's remedial provision. It is neither designed to "make whole" individual victims of discrimination nor calculated to advance "equitable" remedial objectives. Indeed, its principal feature is remarkably "inequitable." And, as developed in our New Orleans brief, where such race-conscious inequities are formulated or approved by the government, including the Judiciary, the equal protection guaranties of the United States Constitution are offended.

Nor should the moral imperative of race- and sex-neutrality be lost in a discussion of legal principles. Race or sex discrimination, based as it is on a personal characteristic that is both immutable and irrelevant to employment decisions, is offensive regardless of which race or gender is victimized. It is no answer to the victim of reverse discrimination to say that quotas lack the invidious character -- the stigmatizing effect -- of discrimination against minorities or women. The consequences of race and sex discrimination are as real and as unjust no matter

who is being victimized. As one Supreme Court Justice has put it: "no discrimination based on race [and I would add "sex"] is benign, . . . no action disadvantaging a person because of his [or her] color [and I would add "gender"] is affirmative." 2/

Proponents of racial preferences maintain that regulation and allocation by race are not wrong per se; rather, they depend for validity upon who is being regulated, on what is being allocated, and on the purpose of the arrangement. Thus, regulation by race has been promoted as an unfortunate but necessary means of achieving a truly race-neutral society. Race must be considered, so the argument goes, "[i]n order to get beyond racism." 3/

Where, it must be asked, is the logic in this proposition? Do we prescribe alcohol to get beyond alcoholism? Nor should we seek to remedy discrimination with discrimination. The late Professor Alexander Bickel of Yale exposed the folly of such reasoning. Writing in The Morality of Consent, he correctly pointed out (at p. 133): "The history of the racial quota is a history of subjugation, not beneficence. . . . [The] quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." No less a champion of equal opportunity and individual liberty than Justice William O. Douglas was equally contemptuous of race-conscious solutions. "The

2/ United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 254 (1979) (Rhenquist, J., dissenting).

3/ Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

Equal Protection Clause commands the elimination of racial barriers," he said, "not their creation in order to satisfy our theory as to how society ought to be organized." 4/

That is precisely the point. Preferential treatment due to race or sex -- whether it serves to get an individual hired, promoted, or retained -- cuts against the grain of equal opportunity. That uniquely American ideal has no greater tolerance for discrimination that favors minorities or women than it does for discriminatory behavior that works to their disadvantage. Whichever way the windmill tilts, no quota system that rests on color or gender distinctions adds up to fairness, no goal demanding racial or sexual preferences is worthy of attainment.

It is on these terms that the Administration has shaped its equal employment opportunity enforcement activities over the past two years, and it is on these terms that we will proceed in the months ahead. The results to date have been encouraging. There is, I think, a far greater appreciation of the strengths -- both legal and moral -- in our position as a result of the public debate that has been generated on the issue of racial preferences. Courts are beginning to look more carefully at the questions raised. And, it is becoming increasingly apparent to the citizens of this country, both black and white, that our policies in this area are driven not by any animus towards particular groups, as some

4/ DeFunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting.)

commentators falsely suggest, but rather by an abiding fidelity to the overarching principle of fairness to all individuals, whatever their race, color, sex, religion or national origin.

Simply put, we believe in the ideal of equal employment opportunity. And that ideal requires that every person receive an equal opportunity for employment on the strength of his or her individual merit. Any compromise of that command, by resort to race- or sex-conscious hirings, promotions or job terminations -- whether the motives be benign or pernicious -- cannot fairly be described as "affirmative."

Thank you.

DOJ-1985-06